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No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, Warden,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a petition for relief under 28 U.S.C. §2254 should be dismissed, without prejudice, where the petition presents several claims for relief but where one or more of the claims have not been presented to the state courts thereby failing to satisfy the exhaustion requirements of 28 U.S.C. §2254(b).

2. Whether habeas corpus relief was properly granted to the respondent on the grounds of prosecutorial misconduct and an improper instruction where these issues were either waived because of procedural defaults or were harmless beyond a reasonable doubt as found by the state courts.

3. Whether the respondent was denied his right of confrontation when the state trial court limited his cross-examination of the rape victim concerning alleged prior contradictory statements about her lack of chastity.

4. Whether the district court erred by granting habeas relief without ordering expansion of the record so as to include the entire state trial transcript.*

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* Former Warden Vinson Thompson and the Attorney General of Tennessee were originally named as respondents in the district court. On April 12, 1979, Warden Jim Rose was substituted for Vinson Thompson pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The unreported memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on June 27, 1980. (J.A. 95). The unreported memorandum opinion of the United States Court of Appeals for the Sixth Circuit denying rehearing was rendered on September 4, 1980. (J.A. 97). The unreported memorandum opinion of the United States District Court for the Middle District of Tennessee, Nashville Division and order granting respondent's petition for writ of habeas corpus was rendered on March 21, 1979. (J.A. 87).

The opinion of the Tennessee Court of Criminal Appeals affirming Lundy's state convictions on August 30, 1974, is reported at 524 S.W.2d 591. (J.A. 52). The Tennessee Supreme Court denied Lundy's petition for writ of certiorari on March 10, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . ..

3. 28 U.S.C. §2254 provides in pertinent part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . ..
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> (d) In any proceeding instituted in a Federal court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a pro-

ceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia shall be presumed to be correct. . ..

4. The provisions of Tenn. Code Ann. §40-3802 provide:

A prisoner in custody under sentence of a court of this state may petition for post-conviction relief under this chapter at any time after he has exhausted his appellate remedies or his time for appeal in the nature of a writ of error has passed and before the sentence has expired or has been fully satisfied.

5. The provisions of Tenn. Code Ann. §40-3805 provide:

Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the Constitution of the United States, including a right that was recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

6. The provisions of Tenn. Code Ann. §40-3811 provide as follows:

The scope of the [post-conviction] hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined, as herein defined.

7. The provisions of Tenn. Code Ann. §40-3812 provide as follows:

A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of

competent jurisdiction in which the ground could have been presented. There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

STATEMENT OF THE CASE

Noah Lundy was convicted by a jury, contrary to his pleas, of rape and crime against nature and was sentenced to terms of 120 years and 15 years, respectively, in the Tennessee State Penitentiary. (J.A. 53). Lundy's convictions were affirmed by the Tennessee Court of Criminal Appeals on August 30, 1974; the Tennessee Supreme Court denied review on March 10, 1975. (J.A. 52). Lundy then petitioned the Knox County Criminal Court, Tennessee, for post-conviction relief which was denied, after an evidentiary hearing, on May 3, 1976. (J.A. 62). No appeal was taken.

Lundy then petitioned the United States District Court for the Middle District of Tennessee, Nashville Division, for a writ of habeas corpus under the provisions of 28 U.S.C. §2254 and alleged four grounds for relief: (1) that he was denied his right of confrontation during cross-examination of the prosecutrix; (2) that he was denied his right to a fair trial because of a prejudicial remark made by the prosecuting attorney to the jury to the effect that Lundy had a violent character; (3) that he was deprived of his right to a fair trial when the prosecuting attorney commented, during closing argument, that the only proof before the jury was from the State's witnesses which was uncontradicted and unrebutted; and, (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. (J.A. 64).

The district court granted habeas relief to Lundy on March 21, 1979, which decision was affirmed by the United States Court of Appeals for the Sixth Circuit. (J.A. 95).

At Lundy's trial the rape victim, Sharon Murphy, was cross-examined before the jury as follows, which is the subject of Lundy's first claim for habeas corpus relief:

> Q. So you had had intercourse with boys during 1973, is that true or not true?
>
> A. Just Aaron Miller.
>
> Q. And you had intercourse with Danny Nipper, a boy by the name of Danny Nipper, had you not?
>
> A. Not in the year '73. That was the year before in '72.
>
> Q. I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not?
>
> A. I don't remember how many times.
>
> Q. *That's what you told me previously.*
>
> A. *I don't remember.*
>
> * * *
>
> Q. Miss Murphy, *did you or did you not tell me on an occasion when I talked with you that you had intercourse with Aaron Miller ten to twenty times?*
>
> A. *I don't remember.*

(J.A. 6-7) [emphasis added].

An objection was made to this line of examination by the prosecuting attorney which was sustained by the trial court, following a jury-out hearing, upon the erroneous ground that defense counsel failed to properly identify himself to the witness during the interview. (J.A. 13). On direct appeal, the Tennessee Court of Criminal Appeals held such reasoning to be erroneous but harmless in light of the offer of proof subsequently made at the jury-out hearing. There, Lundy's counsel had an opportunity to question the rape victim concerning her prior statements

allegedly made in the pre-trial interview. The offer of proof was as follows:

> Q. Did you or did you not tell me when I spoke with you that you had had intercourse with one Aaron Miller ten to twenty times . . ..
>
> A. *I don't remember if I said exactly that.*
>
> Q. Did you tell me you had had intercourse with Danny Nipper four times.
>
> A. I remember telling you I had had intercourse with him, *but I don't remember how many times I had told you.*

(J.A. 24) [emphasis added].

This district court held that the state court's refusal to permit the above examination to be placed before the jury amounted to a denial of Lundy's right of confrontation in violation of the Sixth Amendment. The court of appeals agreed.

In support of a proffer of evidence the prosecuting attorney made the following remarks before the jury, which is the subject of Lundy's second claim for relief:

> Q. Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?
>
> MR. WORKMAN: Your Honor, I still don't see that materiality of this as to . . .
>
> GENERAL GILL: *I would think the defendant's violent nature would be material to this case in light of what the victim had testified to.*
>
> MR. WORKMAN: Your Honor . . .
>
> GENERAL GILL: I assume they claim that he's not this kind of person, and we're trying to show that he is. That's materiality.

> MR. WORKMAN: Your Honor, if I may finish my statement, I don't see any materiality to this case. He's charged in this case with rape and crime against nature.
>
> GENERAL EVANS: Are you finished now. I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show why this young lady was given the advice she was.

(J.A. 17-18) [emphasis added].

The trial court then excused the jury from the courtroom to determine the admissibility of such examination. (J.A. 18). The defendant's objection was sustained and the jury thereafter was instructed to disregard the prosecutor's remark. The Tennessee Court of Criminal Appeals found the prosecutor's remark to have been error; but after reviewing the undisputed evidence found the error to have been harmless beyond a reasonable doubt. (J.A. 58). The district court found the remark to have been error especially when weighed with many other acts of prosecutorial misconduct. (J.A. 91, 93). The court of appeals affirmed and said that Lundy's second claim for relief amounted to a constitutional violation warranting federal habeas relief. (J.A. 96).

During closing arguments the prosecuting attorney, in rebutting the defense counsel's summation, made the following remarks which are the subject of Lundy's third claim for habeas corpus relief:

> Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. *The only story we've heard about* what happened from 8:15 of the night of March 16th until about 4:00 in the morning of March 17th *came from the State's*

> *witnesses.* And we're suppose [sic] to think it's important whether or not he was asleep when we got there, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not at one time at some point she had her hands somewhere on his back.

(J.A. 27) [emphasis added].

The district court held that the foregoing statement deprived Lundy of a fair trial in violation of the Fourteenth Amendment. The court of appeals held that the district court did not grant relief on this claim because it had not been presented to the state courts. (J.A. 93, 95-6).

The trial judge instructed the jury as follows, which is the subject of Lundy's fourth claim for habeas corpus relief:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are the judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for *every witness is presumed to swear the truth.*

(J.A. 31) [emphasis added].

The district court found that this instruction aggravated Lundy's Sixth Amendment claim. (J.A. 93). The court of appeals said that habeas relief was not granted for this claim because it was unexhausted. Lundy never objected to the instruction nor did he raise the issue on appeal.

SUMMARY OF ARGUMENT

I.

Principles of comity dictate that a federal court dismiss a petition under 28 U.S.C. §2254 which contains a mixture of exhausted and unexhausted claims for habeas relief. The exhaustion doctrine recognizes a state's role in having the first opportunity to address federal constitutional claims prior to their presentation to a federal court. *See Ex parte Royall,* 117 U.S. 241 (1886); *Picard* v. *Connor,* 404 U.S. 270 (1971). These principles support the State's argument that a petition for habeas relief which contains a mixture of exhausted and unexhausted claims for relief should be dismissed, without prejudice. Two federal circuits have so applied the exhaustion doctrine. *See Galtieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978), *en banc; Gonzales* v. *Stone,* 546 F.2d 807 (9th Cir. 1976).

Dismissing "mixed" petitions would further the interests of the states by giving them the opportunity to enforce federal constitutional rights in a manner which would provide controlling precedents over their trial courts, would lessen the possibility for inconsistent results between state and federal courts in reviewing the same state conviction, and would minimize the federal interference and disruption of the States' administration of their criminal justice systems. Applying the exhaustion doctrine in this manner would also enhance the orderly administration of federal courts by eliminating piecemeal review of mixed petitions of habeas relief, increasing, the number of state factual findings relative to the federal claims and providing definitive state rulings on matters of state procedural law.

II.

The district court improperly considered claims of prosecutorial misconduct and an improper jury instruction in granting habeas corpus relief. Although the district court noted that one of the two claims of prosecutorial misconduct, as well

as the jury instruction, had not been presented to the state courts, these claims were nevertheless considered by the district court in weighing the harm of the exhausted claims. Most of the prosecutorial misconduct cited by the district court in support of granting the writ was barred from habeas review because of Lundy's state procedural defaults. *See Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). Those few remarks which were presented to the state courts did not amount to egregious misconduct resulting in a denial of due process of law. *See Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). Further, of those acts of misconduct which were presented to the state courts certain factual findings were made reflecting that the remarks were harmless beyond a reasonable doubt. The district court failed to defer to these findings of fact or state its reasons for ignoring them altogether. 28 U.S.C. §2254(d); *Sumner* v. *Mata*, ___ U.S. ___, 101 S.Ct. 764 (1981).

III.

The lower courts erroneously concluded that Lundy's right of confrontation was abridged when the state trial court limited his cross-examination of the rape victim. Lundy attempted to impeach the testimony of the rape victim by a prior contradictory statement allegedly made in a private interview between Lundy's defense counsel and the rape victim. When the rape victim could not recall making the contradictory statement the state trial court refused to permit Lundy's counsel to further pursue this line of examination. During a jury-out hearing Lundy's counsel was given the opportunity to further examine the rape victim and this examination revealed that Lundy was unable to lay a proper foundation for impeaching the victim's testimony. Under state law Lundy was bound by the victim's denial. However, the district court erroneously concluded that the state trial court should have permitted Lundy to further pursue this fruitless line of examination in the presence of the jury. Such failure, the lower federal courts held, amounted to a Sixth Amendment violation.

IV.

The district court should have ordered expansion of the record to properly review the habeas claims, which the district court, *sua sponte,* increased from four to twenty-three. The *entire* state trial transcript was not filed contemporaneously with the State's answer to the petition. Only portions of the record which had been cited by the petitioner in his petition were filed with the district court. However, it was not necessary for the district court to have the entire state trial transcript in order to deny habeas relief because of the extensive factual findings set forth in the opinion of the Tennessee Court of Criminal Appeals which was filed with the district court. The district court's haste in granting relief nine days after the State timely filed its answer was an abuse of discretion where the district court knew that the entire record contained overwhelming evidence of guilt. Although no request for an evidentiary hearing was made by the State in the district court, the State did make a request to the court of appeals for an opportunity to file the entire state trial transcript which was denied.

ARGUMENT

I.

Principles Of Comity Dictate That A Federal Court Dismiss Petitions Under 28 U.S.C. 2254 Which Contain A Mixture Of Exhausted And Unexhausted Claims For Habeas Relief.

The State contends that a state prisoner should exhaust available state remedies for *all* his claims before petitioning for federal habeas relief. Such a rule would be in accordance with this Court's prior decisions and the intent of Congress. At least two federal circuits apply the exhaustion doctrine in this manner. *See Galtieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978), *en banc; Gonzales* v. *Stone,* 546 F.2d 807 (9th Cir. 1976).[1]

In the present case the district court concluded that Lundy had exhausted his first two claims for habeas relief while the latter two claims had never been presented to the Tennessee courts.[2] Nevertheless, the district court proceeded to review all four claims for relief, over the objection of the State, finding the four claims to be interrelated: "[t]here is such a mixture of violations that one [claim] cannot be separated from and considered independently of the others." (J.A. 93).[3]

The State argues that the Tennessee courts should have been afforded the opportunity to review the unexhausted claims before the district court overturned Lundy's state convictions especially since all four claims were interrelated. Four state court tribunals had promptly reviewed Lundy's challenges to his

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[1] The court in *Katz* v. *King,* 627 F.2d 568, 574 (1st Cir. 1980) refused to follow this rule.

[2] The court of appeals agreed that two claims were not exhausted but refused to adopt the Fifth Circuit Rule. (J.A. 96).

[3] The district court stated that the unexhausted claims "will not be considered in the constitutional framework" but nonetheless examined the merits of those claims. (J.A. 88, 93).

convictions. There was no finding by either court below that the presently available remedies under Tennessee law are inadequate to review or correct the unexhausted claims or that exceptional circumstances justified immediate reivew.[4]

A. The exhaustion doctrine was intended to require a state prisoner to present all federal claims to the state courts for resolution prior to invoking the jurisdiction of a federal court.

Application of the exhaustion doctrine reflects a federal policy of comity toward state sovereignties which are equally yoked with federal courts to "guard and protect rights secured by the constitution." *Ex parte Royall,* 117 U.S. 241, 251 (1886). Only under very narrowly prescribed circumstances may a state prisoner bypass the state courts and present his claims directly to a federal court. The notion that a state prisoner may seek piecemeal habeas corpus relief in federal courts is contrary to the precedents of this Court and the intent of Congress.

1. Prior to 1948 the decisions of this Court required exhaustion of all claims unless the state procedures were inadequate or exceptional circumstances necessitated immediate reivew.

In *Ex Parte Royall,* 117 U.S. 241 (1886), the Court held that failure to exhaust available state remedies would warrant dismissal of a state prisoner's petition for federal habeas relief unless "special circumstances" existed necessitating immediate action. *Id.,* at 252. Noting the delicate relations between state and federal courts the Court stated:

> The injunction to hear the case [for habeas corpus relief] summarily . . . does not deprive the [federal] court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exer-

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[4] Tennessee has a liberal post-conviction procedure, enacted in 1967, which permits a state prisoner to challenge his conviction or sentence on federal or state constitutional grounds. Tenn. Code Ann. §40-3801, *et seq.*

> cised in light of the relations existing . . . between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution.

Id., at 251.

This Court later reiterated that habeas review would be deferred pending exhaustion of available state remedies except in those "rare cases where exceptional circumstances of peculiar urgency are shown to exist." *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17 (1925). The *Tyler* Court, after surveying prior decisions, concluded that exceptional circumstances existed only when a state interferes with the operations of the federal government or with the relations between the federal government and a foreign nation.[5]

The judicially crafted exhaustion doctrine did not bar, however, a state prisoner from seeking federal habeas relief where the state remedy was inadequate or non-existent. *Moore* v. *Dempsey*, 261 U.S. 86 (1923). In *Mooney* v. *Holohan*, 294 U.S. 103 (1935) the Court denied a petition for habeas relief where the prisoner had failed to properly present his claim to the state courts:

> Orderly procedure, governed by principles we have repeatedly announced, requires that . . . recourse should he had to whatever judicial remedy afforded by the state may still remain open.

Id., at 115.

---

[5] The *Tyler* Court declared that the lower court should have dismissed the petition on grounds of failure to exhaust state remedies rather than upon the merits.

Finally, in *Ex parte Hawk*, 321 U.S. 114 (1944), this Court summarized and reaffirmed the principles of the exhaustion doctrine. The Court noted that a state prisoner could not seek federal habeas relief until the claims had been presented to the state courts except in those rare cases where "exceptional circumstances" were present or where the state remedies were unavailable or seriously inadequate. *Id.*, at 116-118.

2. The exhaustion doctrine, as crafted by this Court, was codified by Congress in 1948.

In 1948 Congress codified the exhaustion doctrine in section 2254 of the Revised Judicial Code.[6] Section 2254 was intended to merely codify the exhaustion doctrine as delineated in the precedents of this Court. *See Darr* v. *Burford*, 339 U.S. 200, 210-214 (1950); *Fay* v. *Noia*, 372 U.S. 391, 434-435 (1963).

Though the wording of the statute requires exhaustion of the "the *question* presented"[7] it is clear that Congress was not addressing the issue of exhaustion of claims as opposed to exhaustion of the entire case. In 1948 neither Congress nor this Court was likely to have been aware of the unique situation posed when a habeas petitioner would later combine exhausted and unexhausted claims in a single petition. At that time very few claims were cognizable on federal habeas review. *See Stone* v. *Powell*, 428 U.S. 465, 475-476 (1976).[8] Until the decision in *Fay* v. *Noia*,[9] federal courts would refuse to consider unexhausted claims where a state prisoner deliberately bypassed state procedures in order to seek federal habeas relief. *Brown* v. *Allen*, 344 U.S. 443, 485 (1953). Therefore, the statutory requirement

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[6] 28 U.S.C. §2254 (1970) (b)-(c).

[7] *Id.*, §2254(c).

[8] Developments in the Law - Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1042-1056 (1970).

[9] 372 U.S. 391, 420-426 (1963).

that the "question" be presented to the state court was not intended to encourage piecemeal federal habeas review of mixed petitions and thereby relax the exhaustion requirement.[10] To the contrary, Congress envisioned complete and total exhaustion of each and every claim.

3. Subsequent development of the exhaustion doctrine has preserved its original intent.

The exhaustion doctrine has not been changed or altered by Congress since its codification. Amendments to habeas corpus statutes have merely codified changes as reflected in the decisions of this Court. *See Wainwright* v. *Sykes,* 433 U.S. 72, 80-81 (1977).

The requirement that "special circumstances" must exist to justify a waiver of the exhaustion requirement was reaffirmed by this Court in *Frisbie* v. *Collins,* 342 U.S. 519 (1952). The Court accepted the lower court's finding of "special circumstances" where the petition alleged that the state had acquired jurisdiction over the prisoner by violating a federal kidnapping statute, thereby necessitating immediate review of the state's custody.[11] The requirement that the exhaustion must occur where the state remedies are adequate for providing review of the claim was reaffirmed in *Picard* v. *Connor,* 404 U.S. 270, 272, n. 3 (1971).

This Court has heard only two cases which involved mixed claims in a petition for federal habeas relief. In *Gooding* v. *Wilson,* 404 U.S. 518 (1972) this Court affirmed a grant of habeas relief where the petitioner was convicted under a statute containing First Amendment defects while noting, but not rul-

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[10] *See Darr* v. *Burford,* 339 U.S. 200, 211-212, n. 33-34 (1950). The 1966 amendment clearly supports the view that Congress desires to narrow, not broaden, habeas review. *See* 28 U.S.C. §2254(d) (1970).

[11] *Collins* v. *Frisbie,* 189 F.2d 464 (6th Cir. 1971).

ing upon, the existence of an unexhausted claim. *Id.* at 519. Two years later in *Francisco* v. *Gathwright,* 419 U.S. 59 (1974), this Court declined a prisoner's request to reverse a lower court's dismissal of his petition of the ground that it contained both an unexhausted and exhausted claim. The Court expressly reserved this issue for future resolution and decided the case on other grounds. *Id.* at 63-64. The State submits that mere consideration of those cases was not tantamount to a imprimatur regarding the proper exercise of federal jurisdiction over mixed petitions for habeas relief. *Cf., Stone* v. *Powell,* 428 U.S. 465, 480-481 (1976) (habeas review of Fourth Amendment claims).

Finally, in 1976 this Court proposed, and Congress approved, procedural rules and a model form for proceedings under section 2254. While the rules do not further address the exhaustion doctrine the form does contain a cautionary note requiring the prisoner to exhaust his state remedies "as to each ground" for habeas relief (*see* J.A. 69). This requirement comports with this Court's prior decisions and the intent of Congress.

B. Dismissal of mixed petitions for habeas relief, without prejudice, would further the interests of the state, the federal courts, and the prisoner.

Following the precedents set by this Court and the intent of Congress, the Fifth and Ninth Circuits require lower federal courts to dismiss, without prejudice, petitions for habeas relief which contain a mixture of exhausted and unexhausted claims for relief. *Galtieri* v. *Wainwright,* 582 F.2d 348, 354 (5th Cir. 1978), *en banc; Gonzales* v. *Stone,* 546 F.2d 807, 810 (9th Cir. 1976). Applying a balancing test these circuits have concluded that the interests of the state prisoner, the state judicial system,

and the orderly administration of the federal courts require that "mixed" petitions be dismissed, without prejudice.[12]

This approach recognizes that the exhaustion doctrine "reflects a careful balance between important interests of federalism and the need to preserve the rule of habeas corpus as a 'swift and imperative remedy ....' " *Braden* v. *30th Judicial Circuit Court,* 410 U.S. 484, 490 (1973). This approach also preserves the interests of the prisoner while advancing important considerations of comity, finality and judicial efficiency. The Fifth Circuit, in dismissing a mixed petition, summarized these considerations as follows:

> Our decision is based not on ad hoc factual distinctions, but on compelling precedent. By remanding for exhaustion, we respect comity, yet we also reserve our commission to draw the precious writ from its sheath if a federal judicial remedy proves necessary and proper in the final disposition of Lamberti's lamentations. Our remedy is not only technically and precedently required, it is an exercise of judicial restraint appropriate to the traditions of our revered federalism. It is a salutary rule that requires a petitioner for the writ of habeas corpus to pass through the state's curative filters before applying to the federal judicial chambers. That the request for the writ be so structured not only assures the State a power of redemption before federal judgment is brought to bear, but it also assures that our federal courts' perspective will not be blurred and obscured by an excess of petitions filed here in the first instance.

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[12] The Second Circuit has adopted a rule which also dismisses an entire petition containing mixed claims for relief, but only when the claims are interrelated. *United States ex rel. Martin* v. *McMann,* 348 F.2d 896, 898 (2d Cir. 1965), *en banc. Accord, United States ex rel. Boyance* v. *Myers,* 373 F.2d 111, 112-113 (3d Cir. 1967); *Huwett* v. *North Carolina,* 415 F.2d 1316, 1320 (4th Cir. 1969); *Triplett* v. *Wyrick,* 549 F.2d 57, 59 (8th Cir. 1977); *Watson* v. *Patterson,* 358 F.2d 297 (10th Cir. 1966). This rule however, provides no guidance for determining when such claims are interrelated.

Lamberti v. *Wainwright*, 513 F.2d. 226, 279 (5th Cir. 1975).

1. Important interests of the State require exhaustion of all claims.

State courts are equally bound with the federal courts to enforce federal constitutional rights. *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884); *Wade* v. *Mayo*, 334 U.S. 672, 679 (1948). See Tenn. Const., art. X, §1. Premature federal review of a state court conviction, however, frustrates this constitutional responsibility of the state courts. Spawned by principles of comity the exhaustion doctrine is designed to reduce the friction between federal and state courts necessarily caused when a single federal judge overturns a state conviction affirmed by its own highest court. *Ex parte Royall*, 117 U.S. 241, 251-253 (1886). Hence, the exhaustion doctrine gives a state the first opportunity to review each constitutional question. *Picard* v. *Connor*, 404 U.S. 270 (1971).

Proper application of the exhaustion doctrine directly results in the enhancement of a state's understanding of and hospitality toward federal claims. *See Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973). Because it is the State which has expended its own resources to arrest, prosecute, convict, and provide meaningful appellate review to a prisoner it is the State which has the primary interest in assuring the finality of its criminal judgment. A prisoner should be required to exhaust *all* his federal claims in the state courts before seeking federal review. The finality of state review should be a prerequisite to the initiation of federal review.[13]

Permitting piecemeal review of mixed habeas petitions vitiates the policies underlying the exhaustion doctrine. While

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[13] This requirement is tempered by the provision that a prisoner need only present his federal claim once to the state's highest court. *Brown* v. *Allen*, 344 U.S. 443, 448 n. 3 (1953); *Roberts* v. *LaVallee*, 389 U.S. 40, 43 (1967).

the prisoner pursues his exhausted claims in federal courts he can continue to pursue his unexhausted claims in the state courts. Inconsistent results are not unlikely. Even worse, the state courts would likely abstain from reviewing the unexhausted claims in order to prevent unnecessary decisions on federal *and* state constitutional law so long as the prisoner was still seeking relief through the federal courts.

The appellate state courts also have the important responsibility of supervising their own trial courts. Decisions of the United States Supreme Court and the state appellate courts are binding on Tennessee trial courts; such is not the case with the opinions of lower federal courts. *Bowman* v. *Henard,* 547 S.W.2d 527, 530 (Tenn. 1977). Thus, premature federal review deprives the states of an opportunity to declare controlling state precedent on matters of federal constitutional law.

Premature federal habeas review also preempts consideration of any *state* constitutional claim, particularly at a time when Tennessee has construed its own constitutional provisions more broadly than its federal counterparts.[14] Requiring exhaustion of all claims guarantees that a state will have the first opportunity to review every constitutional challenge made by a prisoner in attacking his state conviction. Significantly, such a rule would encourage a prisoner to present all his federal constitutional claims in a single proceeding and discourage him from sandbagging his federal claims in hopes of later obtaining relief in a federal forum. *See Murch* v. *Mottram,* 409 U.S. 41, 45-46 (1972); *Wainwright* v. *Sykes,* 433 U.S. 72, 89 (1977).

Further, requiring complete exhaustion of all claims gives the states an opportunity to conduct, if necessary, evidentiary hearings at an early stage when memories are fresh as to contested

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[14] *See, e.g., Miller* v. *State,* 584 S.W.2d 758, 761 (Tenn. 1979) (ex post facto provision); *State ex rel. Anglin* v. *Mitchell,* 596 S.W.2d 779, 789 (Tenn. 1980) (non-lawyer juvenile judge).

issues of fact. Such factual findings could expedite subsequent federal habeas review. 28 U.S.C. §2254(d); *Sumner* v. *Mata*, ____ U.S. ____, 101 S.Ct. 764 (1981). Finally, requiring complete exhaustion would minimize disruption not only of a state's administration of its justice system but the prisoner's custodial status as well. *Galtieri* v. *Wainwright*, 582 F.2d 348, 360 (5th Cir. 1978).

2. The need for orderly administration of the federal courts mandates exhaustion of all federal claims.

Requiring dismissal of a petition containing mixed claims for federal habeas relief would not only eliminate piecemeal litigation of a case but would substantially increase the correctness of subsequent habeas review particularly where granting relief is dependent upon either factual conclusions or a determination of a state's procedural law.

Piecemeal review of mixed petitions for habeas relief is antithetical to judicial efficiency and the policy against fragmentary appeals. *Parr* v. *United States*, 351 U.S. 513 (1956); *Murch* v. *Mottram*, 409 U.S. 41, 45-46 (1972). A state prisoner should not be permitted to obtain a ruling on his exhausted claims while keeping the federal door ajar for a second petition containing the previous unexhausted claims. Requiring complete exhaustion would not only relieve federal courts of the burden of successive petitions, a result mandated by this Court and Congress, but also encourage litigation of the entire case in a single proceeding. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 274 (1973) (Powell, J., concurring); *Sanders* v. *United States*, 373 U.S. 1, 28-29 (1963); Rules Governing Section 2254 Cases, 9(b), 28 U.S.C. foll. §2254.

Requiring exhaustion of all federal claims would also provide the federal courts with a complete factual record often necessary to resolve the federal claim. The factual findings could very well be determinative as to the denial of habeas relief. 28 U.S.C. §2254(d). Complete exhaustion would also produce a definitive

ruling on a state's procedural laws, thereby leaving no doubt whether a claim would be barred from habeas review due to a procedural default.[15]

3. The interests of the prisoner are not prejudiced by requiring exhaustion of all claims.

The prisoner's interest is primarily in speedy federal review. The quest for judicial efficiency is not a subterfuge designed to ease the workloads of federal judges while prejudicing the state prisoner's interests. Increasing judicial efficiency actually benefits the meritorious habeas petitioner.

> It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.

Brown v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring). Similarly, the pursuit of habeas relief contemporaneously in two forums will likely discourage a prisoner by the delays caused from such judicial inefficiency.

This Court has recognized that a prisoner has a legitimate interest in prompt release from illegal incarceration. *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973). But it is not unusul, as in the instant case, for a prisoner to slowly embark on a trek of federal habeas review when he knows the state will likely be prejudiced if the writ is granted and a new trial is

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[15] A federal court should dismiss a mixed petition even when the state court might not address the merits of the claim due to procedural defaults. *See Carothers* v. *Rhay*, 594 F.2d 225, 228 (9th Cir. 1979) and *Vester* v. *Stephenson*, 465 F.Supp. 868, 869-879 (E.D. N.C. 1978). The case of *Hockenbury* v. *Sowders*, 620 F.2d 111 (6th Cir. 1980) is a typical example of the sticky problems which occur when a district court presumptiously interprets a state's procedural laws. The instant case is a prime example. Had Tennessee's courts reviewed the unexhausted claims, as expanded by the district court, determinative questions about procedural defaults would not be before this Court.

required. Asking a rape victim to retell the horrors of the prisoner's crimes after she has attempted to forget the events, though seared upon her mind, is sometimes asking the impossible — and the prisoner knows its.

> It is not seemly that years after a conviction when time has dulled the memories, when death has stilled tongues, when records are unavailable, convicted felons, unburdened by any handicap to a normal presentation of unfairness in their trial should be permitted to attack their sentence collaterally by habeas corpus, because of errors, known to them at the time of trial.

Wade v. *Mayo,* 334 U.S. 672, 695 (1948) (Reed, J., dissenting). *See also, Hankerson* v. *North Carolina,* 432 U.S. 233, 247 (1977) (Powell, J., concurring); *Sanders* v. *United States,* 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

In the instant case Lundy was convicted on August 24, 1974. The state appellate process was completed on March 10, 1975. His state conviction for post-conviction relief was denied on May 3, 1976, there being no appeal therefrom. (J.A. 62). Almost three years later Lundy sought federal habeas review. (J.A. 64). Lundy's own inaction in the instant case belies any suggestion that he earnestly seeks prompt federal review of his state conviction. He cannot be heard to plead for promptness when he has done nothing himself to facilitate prompt habeas review. His deliberate bypass of available state remedies for his unexhausted federal claims demonstrates that he is more concerned about forum shopping than in obtaining prompt vindication of his federal rights.

Requiring dismissal of a petition containing mixed claims will produce one of two decisions by the prisoner: he will go back to state court or withdraw his unexhausted claims from the petition and take his chances with the exhausted claims. Pursuing

this latter alternative unsuccessfully could very likely shut the federal habeas door altogether.[16] Rules Governing Section 2254 Cases, Rule 9(a)-(b), 28 U.S.C. foll, §2254. This requirement would discourage "sandbagging" in the state courts and assure that someday the prisoner's state conviction will become final by having only one federal case which reviews his state conviction.

II.

The District Court Improperly Granted Habeas Relief On The Ground Of Prosecutorial Misconduct.

In grounds 2 and 3 of Lundy's petition for federal habeas corpus relief he complained of the following statements made by one of the prosecuting attorneys:

> 2. The remark made in support of the State's proffer of certain evidence to the effect that Lundy had a violent character;
>
> 3. The remark that the State's proof was uncontradicted.

(J.A. 72-74).

Agreeing with the State that the second remark had not been presented to the state courts, the district court nonetheless felt compelled to weigh the prejudicial effect of both remarks. Further, the district court found seventeen additional acts of alleged prosecutorial misconduct and proceeded to review the prejudicial effect of each act, though most were barred from habeas review because of Lundy's procedural defaults. The district court considered all nineteen remarks as amounting to a deprivation of Lundy's right to a fair trial. (J.A. 89-92).

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[16] This is precisely what should happen. *See, e.g., Earl* v. *Estelle*, 503 F.Supp. 406, 408 (N.D. Tex. 1980).

However, only five of the nineteen acts of misconduct were properly objected to or subsequently presented to the state supreme court.[17]

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[17] Of the 19 cited instances of alleged prosecutorial misconduct 14 were neither objected to at trial nor presented to the state supreme court. It is necessary to address, seriatum, each act of misconduct found by the district court in its opinion as compared to what the record actually reveals. (1) The prosecutor did not accuse the defense attorney of "illegal and unethical conduct" in front of the jury; rather, he stated that the defense attorney's pre-trial interview was "completely improper." (J.A. 7). The issue was presented to the state supreme court. (2) No objection was made to the prosecutor's statement that the rape victim was telling the truth nor was this issue presented to any state appellate court. (J.A. 7, 10). (3) The propriety of the prosecutor's statement regarding the defense counsel's method of interviewing the prosecutrix was presented to the state supreme court. (J.A. 50-15). (4) Though no objection was made to the prosecutor's assertion with regard to the proper method of interviewing a state witness such issue was nevertheless considered by the state appellate courts. (J.A. 61). (5) The prosecuting attorney's representation to the trial court that the rape victim had a right to have her counsel present at a pre-trial interview was presented to the state appellate courts. However, the prosecutor's remark that a state's attorney should have been present during the interview, as cited by the district court, was made out of the presence of the jury. (J.A. 9). (6) The prosecutor's remark that the defense counsel's pre-trial interview tactics were "inexcusable" was made out of the presence of the jury. (J.A. 12). (7) The prosecutor's reference to the denial of an intention to later file a grievance with the bar association was made out of the presence of the jury and was not presented to the state courts. (J.A. 12). (8) The prosecutor's objection to cross-examination of the rape victim, labeled by the district court as misconduct, was neither objected to nor presented to the state courts. (J.A. 7-11, 35-38, 45-48, 50-51). (9) The remark by the prosecuting attorney that "the defendant's violent nature" was material in support of the proffer of evidence was presented to the state appellate courts. (10a) No objection was made to the prosecutor's personal evaluation, during rebuttal summation, of the gravity of the crime nor was this issue presented to the state courts. (J.A. 27, 35-38, 50-51). (10b) No objection was made to the prosecutor's person evaluation of the seriousness of the offense, nor was the issue presented to the state courts. (J.A. 29). (10c) No objection was made to the prosecutor's comments that the State's evidence was uncontradicted, which is the subject of Lundy's third claim for

A. The Remark concerning Lundy's violent character was harmless beyond a reasonable doubt.

During Lundy's state trial his fourteen year old companion testified because she was an eye-witness to Lundy's crimes. In hopes of eliciting testimony that Lundy was a violent individual and capable of following through with threats he made to the rape victim, the girl was asked if she had seen Lundy mistreat the girl's sister. Objection was made on the ground of materiality. (J.A. 17). In support of the examination the prosecuting attorney stated:

> I would think the defendant's violent nature would be material to this case in light of what the victim has testified to.

(J.A. 17).

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habeas relief; the issue was also not presented to the state courts. (J.A. 27). (10d) No objection was made to the prosecutor's personal evaluation regarding the unimportance of certain inconsistencies in the state's proof and neither was the issue presented to the state courts. (J.A. 27). (10e) No objection was made to the prosecutor's statement that he could not believe the previous remarks made by defense counsel and neither was this issue presented to the state courts. (J.A. 28). (10f) No objection was made to the prosecutor's personal evaluation of the importance of the case to the rape victim and neither was this issue presented to the state courts. (J.A. 29). (10g) No objection was made to the prosecutor's personal evaluation that the prosecutrix would not ever forget the crime nor was the issue presented to the state courts. (J.A. 29). (10h) No objection was made when the prosecutor briefly related a pre-trial conversation he had with the prosecutrix and neither was the issue presented to the state courts (J.A. 29); the district court criticized the prosecuting attorney for drawing legitimate inferences from the evidence admitted at the trial. (10i) No objection was made when the prosecutor stated his desire to personally sit on the jury and neither was the issue presented to the state courts. (J.A. 30). (10j) The prosecutor's suggestion of a standard sentence for rape was properly objected to and a curative instruction was given, but the issue was not presented to the state courts on appeal. (J.A. 30).

The objection to this line of examination was thereafter sustained by the trial court and the jury was immediately instructed to disregard the import of the State's question and the answer given thereto. (J.A. 22,23).

After a thorough review of the evidence the Tennessee Court of Criminal Appeals held:

> [I]n the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 . . . (1967); *Huffman* v. *State,* . . . 458 S.W.2d 29 (1970).

(J.A. 58).

What made the error harmless "beyond a reasonable doubt" were the undisputed facts. The rape victim, Sharon Murphy, testified she was enticed into Lundy's automobile by Lundy's fourteen-year-old female companion, Terri Tankersly, at Lundy's direction, on the pretext of giving the victim a ride home. She entered the car in response to an offer of a ride in the belief that the couple lived in the neighborhood. Lundy did drive her past the apartment where she was living, but refused to stop the car. The victim testified that after passing her home Lundy restrained her by grabbing her arm, subsequently ordered her to change places with the other girl by moving to the center seat position, and as they continued to drive, ordered her to remove all her clothing. The victim asked Terri Tankersly if she had to, and was given an affirmative answer. Lundy told the victim that he would knock her brains out if she did not undress. Scared and crying, Miss Murphy completely disrobed. At Lundy's direction Terri Tankersly blindfolded the victim with Miss Murphy's bra.

When the three arrived at Lundy's apartment the victim was allowed to put back on her shorts and a jacket and was led inside. Once inside the apartment Lundy ordered her to completely disrobe again, and to get upon the bed. Her blindfold was

removed at her request. Lundy also undressed. The victim asked for a drink of water, which Tankersly got for her. Lundy made her drink some whiskey from a bottle from which he was imbibing. He then ordered Miss Murphy to lie on the bed. She testified that he took her hands and held them up over her head as he commenced intercourse.

After the first act of intercourse, which apparently did not result in a sexual climax for Lundy, he ordered Terri Tankersly to put a cloth on the kitchen table. He then ordered the victim to go to the kitchen and lie upon her back upon the table, with her head hanging over the edge. He threatened to knock her brains out if she did not comply. When the victim was thus positioned, Lundy ordered Miss Murhpy to open her mouth, and "he stuck his penis down my throat." She gagged and pushed him away, at which time he viciously struck her with his fist upon the cheek, the mouth and the forehead. The victim commenced crying again. He made her lie back down and inserted his penis down her throat and moved in and out. Miss Murphy started to vomit and pushed him away again. He then struck her with his fist upon the abdomen and upon the right side. She got off the table, crying, and asked for a drink of water. His response was to make her get down on her knees while he urinated in her mouth, making her swallow most of the urine.

Lundy then ordered the victim back into the bed, already occupied by the disrobed Terri Tankersly. He first ordered Miss Murphy to insert her finger into Tankersly's vagina and manipulate it, despite Tankersly's begging him not to. After this was done he ordered Miss Murphy to suck Tankersly's vagina. When her compliance did not suit Lundy, he struck Miss Murphy twice upon the back of her head with his fist. She then performed the cunnilingus for about two minutes before becoming sick. Lundy then allowed her to stop. Terri Tankersly testified that while Miss Murphy was performing cunnilingus upon her that Lundy was "trying to have relationship with Murphy in her rear end."

Finally, Lundy had normal intercourse with the victim again, for more than thirty minutes without ever reaching a climax. He discussed tying Miss Murphy to the bed and keeping her for two or three days, and even had the other girl to tie some socks together to use as bindings. However, at the victim's suggestion, he went to sleep. Significantly, Terri Tankersly, the fourteen year old companion of Lundy and with whom he had admittedly been having sexual intercourse for years, fled the apartment as soon as Lundy was asleep. She tried to get Miss Murphy to go with her, expressing fear that Lundy was going to kill both of them; but the victim was afraid to leave at that time for fear of awakening Lundy, who had an arm and leg across her. Some two hours later when Lundy turned over, she fled the premises, hailed a passing taxi, and immediately reported having been kidnapped and raped.

These facts were deduced from the testimonies of Miss Murphy and Terri Tankersly, the defendant's post-arrest statement, the victim's fresh complaint and expert medical testimony.

The district court and court of appeals ignored these factual findings.[18] The federal courts did not explain why the state court's findings, made in accordance with *Chapman* v. *California,* 386 U.S. 18 (1967), were not entitled to deferrence by reason of 28 U.S.C. §2254(d). The district court, and court of appeals (over the State's objection), never recognized that their findings of prejudicial error on the point were directly contrary to the state court's analysis and conclusions. This was a clear violation of section 2254(d). *Sumner* v. *Mata,* ____ U.S. ____, 101 S.Ct. 764 (1981).

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[18] Also, the district court had before it the brief which Lundy filed in the Tennessee Court of Criminal Appeals which very specifically detailed the evidence admitted at his trial. That brief reflects that there was medical evidence which also corroborated the rape victim's testimony. (J.A. 34).

B. The district court erroneously granted habeas relief for the remaining acts of prosecutorial misconduct.

Although Lundy only cited two instances of prosecutorial misconduct as grounds for habeas relief, the district court noted the existence of seventeen additional acts of alleged misconduct, most of which were characterized by the district court as testimonial misconduct of the prosecutor. In addition to the "violent character" remark, the Tennessee Court of Criminal Appeals reviewed only four other remarks and found them to have been harmless. These remarks consisted of the prosecutor's criticism of the defense counsel. The State courts never had the opportunity to review the remaining fourteen acts of alleged misconduct to determine whether they constituted prejudicial error or had been waived because of procedural defaults.

The State contends that review of the fourteen additional remarks was barred because of Lundy's failure to timely object thereto or to present them to the state courts.[19] In the absence of any finding of cause of prejudice these claims were barred from

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[19] Tennessee has long operated under a procedural rule requiring contemporaneous objections to remarks and arguments by a prosecutor in order to seek appellate review of the prosecutor's conduct. *Edwards* v. *State*, 540 S.W.2d 641 (Tenn. 1976), *cert. denied*, 429 U.S. 1061; *Manning* v. *State*, 195 Tenn. 194, 157 S.W.2d 6 (1953). Thus, Lundy is barred from seeking federal habeas relief for at least thirteen of the fourteen acts of misconduct which were not presented to the state courts on the ground of his procedural defaults.

habeas review. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).[20] Lundy's third claim for relief (the prosecutor's comment that the State's evidence was uncontradicted) was not presented to any state court. The district court realized this but held:

> [S]ubject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such a mixture of violations that one cannot be separated from and considered independently of the others.

(J.A. 93).

The district court distinguished this case from *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974), indicating that in this case the state trial judge failed to take any "special pains" to correct the prosecutor's misconduct. This ignores the fact that the trial court gave, *sua sponte*, cautionary instructions on each of the two occasions when Lundy made a contemporaneous objection to the state's closing argument. (J.A. 28, 30). The only reason more "special pains" were not taken was because of Lundy's failure to object. *See Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). The State contends that those remarks which were properly presented to the state court or even objected to at trial did

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[20] Ignoring Lundy's procedural defaults, the lower courts evidently held that the improper remarks by the prosecutor constituted plain error. The State contends that application of a plain error rule to excuse a procedural default is contrary to the "cause" and "prejudice" test. *See Henderson* v. *Kibbe*, 431 U.S. 145, 146 (1977); *Hockenbury* v. *Sowders*, 620 F.2d 111, 114 (6th Cir. 1980). *Contra, Frady* v. *United States*, 636 F.2d 506 (D.C. Cir. 1981). The district court made no finding that cause or prejudice existed to permit habeas review.

In Lundy's federal petition for habeas relief he avered that he made no objection to the errors in grounds three and four of the petition because he was not aware that these claims amounted to constitutional violations. (J.A. 75). He has never asserted his innocence of the crimes.

not amount to egregious misconduct resulting in a denial of due process of law. *See Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647-648 (1974).

III.

The District Court Erroneously Concluded That Lundy's Right Of Confrontation Was Denied When The State Trial Court Limited His Cross-Examination Of The Rape Victim.

At Lundy's state trial his counsel attempted to impeach the rape victim through evidence of prior contradictory statements allegedly made by her to the defense counsel during a pre-trial interview. (J.A. 6-7). Lundy's counsel was attempting to prove that her testimony regarding prior acts of unchastity did not fully reveal all such acts as allegedly revealed to him in the interview.

The trail court prevented Lundy's counsel from inquiring into the prior statements upon the erroneous ground that the defense counsel had failed to properly inform the witness as to counsel's role in the case. (J.A. 13). The Tennessee Court of Criminal Appeals agreed that the trial court's *reasoning* was erroneous. (J.A. 60-61).

However, the record reflects that the trial court's decision was correct because the rape victim denied, in the presence of the jury, that she recalled ever having made the statements to the defense attorney. (J.A. 7). Later, the trial court did permit Lundy's counsel to make an offer of proof out of the presence of the jury. Examination of the rape victim at the jury-out hearing reflected that Lundy could not prove that the alleged prior contradictory statements were ever made (J.A. 24-25). The Tennessee Court of Criminal Appeals held that the state trial judge's limitation upon cross-examination was harmless under the circumstances of the case and in light of the offer of proof. (J.A. 60-61). The district court, however, held that the defendant's right of confrontation was denied because "the jury had no opportunity to determine whether the witness had *made* a

conflicting statement to the defense attorney prior to trial." (J.A. 93) [emphasis added]. However, in reaching this conclusion the district court must have overlooked the record which reflects that the defense attorney was permitted to ask the rape victim whether she had made the alleged prior contradictory statement:

> Q. Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had had intercourse with Aaron Miller ten to twenty times?
>
> A. I don't remember. (J.A. 7).

The State's objection to the question and answer was overruled by the trial court although the defense counsel was not permitted to further continue this line of inquiry. The trial court's ruling, though based upon an erroneous ground, was nonetheless in accordance with Tennessee law which binds the cross-examiner to the answer given on a collateral matter such as impeachment. *McGowen* v. *State,* 221 Tenn. 442, 427 S.W.2d 555, 559 (1968). Additionally, the trial court made it clear to Lundy's counsel that this ruling did not preclude cross-examination with regard to specific acts of unchastity. (J.A. 15-16).[21]

The district court and court of appeals held that the trial court's limitation upon cross-examination operated to deny Lundy of his right of confrontation. Also, the lower federal courts impliedly rejected the state court's factual finding of harmless error without explanation. 28 U.S. §2254(d) *Sumner* v. *Mata,* ____ U.S. ____. 101 S.Ct. 764, 771 (1981).

The State contends that there was no Sixth Amendment violation. The lower court's reliance upon *Davis* v. *Alaska,* 415 U.S.

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[21] At the time of Lundy's trial a defendant was entitled to question the rape victim with regard to her prior acts of unchastity to establish consent to the intercourse. *Guy* v. *State,* 1 Tenn. Crim. App. 266, 443 S.W.2d 520 (1969).

308 (1974) in finding constitutional error was clearly misplaced. Because of a state law the defendant in *Davis* was precluded from cross-examining a key state witness concerning his motive for testifying untruthfully.

The *Davis* court held that the trial court's limitations upon cross-examination denied the defendant his right of confrontation where the witness' previous answers were less than candid and a full cross-examination would have exposed the truth concerning the witness' motive for testifying.

Davis is clearly distinguishable from the instant case. Under state law Lundy was permitted to prove lack of chastity to negate the element of force. But the limitation upon cross-examination pertained only to a *collateral matter, i.e.*, the attempt to impeach the victim's testimony by an alleged prior contradictory statement. The jury heard the victim's denial of making the prior statement. Lundy was bound by her denial. The lower courts simply overlooked this portion of the record and, therefore, incorrectly analyzed the constitutional claims. Ironically, if the State is required to retry Lundy he would not be permitted to cross-examine the rape victim about her prior acts of unchastity, much less the alleged prior contradictory statements. Tennessee has enacted a rape shield law protecting such inquiry unless clearly material to the issue of consent. Tenn. Code Ann. §40-2445 (Supp. 1980). *See, Walters* v. *State*, 578 S.W.2d 652, 654 (Tenn. Crim. App. 1978) (no right to introduce such evidence merely because defendant testifies victim consented). *See also,* Fed. R. Evid. 412.

IV.

The Court Of Appeals Should Have Remanded The Cause For A Full And Fair Evidentiary Hearing.

The district court granted habeas relief nine days after the State timely filed its answer to the petition. With this answer the State filled only those portions of the voluminous state trial

transcript which had been specifically referred to in Lundy's petition. The district court granted habeas relief on grounds which necessarily demand review of the entire state trial transcript to determine whether or not constitutional violations were harmless beyond a reasonable doubt. *See Chapman* v. *California,* 386 U.S. 18, 22-24 (1967); *Harrington* v. *California,* 395 U.S. 250, 253-254 (1969); *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642 (1974).

Congress did not intend for federal courts to hastily grant habeas corpus relief where expansion of the record was necessary to protect the rights of all parties and to ensure a correct result. Rules Governing Section 2254 Cases, Rules 5, 7-8, 28 U.S.C. foll. §2254.[22] Ordering an expansion of the record or a hearing to permit the State to address claims not presented in the petition, though relied upon by the district court in granting relief, would have enabled the lower federal courts to properly weigh the prejudicial effect of the alleged constitutional violations in light of all the evidence presented at Lundy's state trial. Although the State did not move the district court for reconsideration in order to offer the entire state trial transcript, the district court should have *sua sponte* ordered expansion of the record. The State did request such relief before the court of appeals, which was denied.[23] Although no request for an evidentiary hearing was made in the State's answer to the petition,

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[22] *See* Developments in the law - Federal Habeas Corpus, 83 Harv.L.Rev. 1039, 1179-1192 (1970).

[23] The request was made in the State's petition for rehearing and in two motions seeking permission to file the entire state trial transcript, which motions were denied. (J.A. 2-3).

such failure does not operate as a waiver of the right to insist upon a full and fair hearing on behalf of the State.[24]

> Respondent's failure to assert the need for an evidentiary hearing in its motion to dismiss did not necessarily deprive him of the right to assert the absence of a hearing . . . as error on appeal . . ..

Browder v. *Director, Department of Correction of Illinois,* 434 U.S. 257, 266 (1978).

The State contends that the resulting injustice caused by the district court's failure to order expansion of the record is illustrated by its rationale in granting relief. The district court held that the right of confrontation claim was aggravated by the fact that the State's evidence rested solely upon the credibility of the rape victim. However, if the district court had only reviewed the entire state transcript it would have realized that the rape victim's testimony was corroborated in all respect by another eye-witness, the defendant's confession, and other important evidence, all of which were relied upon by the Tennessee Court of Criminal Appeals. (J.A. 53-59).

However, consideration of the entire state trial transcript was not necessary in order to reach the correct result denying relief in this case. Before the district court was a thorough recitation of the evidence as set forth in the opinion of the Tennessee Court of Criminal Appeals and in Lundy's state appellate briefs. This, taken with the statutory presumption of correctness of the State's determination of the facts, would have been sufficient to deny habeas corpus relief.

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[24] *See Aston* v. *Warden,* 574 F.2d 1169, 1171-1172 (4th Cir. 1978); *United States ex rel. Mitchell* v. *Follette,* 358 F.2d 922, 929 (2d Cir. 1966); *United States ex rel. McNair* v. *New Jersey,* 492 F.2d 1307, 1309 (3d Cir. 1974); *Willette* v. *State of Georgia,* 608 F.2d 538, 541 (5th Cir. 1979).

CONCLUSION

The State requests that the judgments of the lower courts be vacated and the petition dismissed.

Respectfully submitted,

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